



In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No. 79-574

STATE OF OHIO,

Petitioner,

vs.

ELBERT TATE,

Respondent.

**RESPONSE TO PETITION FOR WRIT OF
CERTIORARI TO THE
SUPREME COURT OF OHIO**

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Respondent



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Rule 19(1)(a), Rules of the Supreme Court of the United States, generally limits the grant of a Writ of Certiorari to those cases

“Where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court.” (emphasis added)

It is apparent from the State of Ohio’s Petition, as well as from the Opinion of the Ohio Supreme Court, *State of Ohio v. Tate*, 59 Ohio St. 2d (July 11, 1979), that this matter neither presents a “federal question of substance” nor a decision “not in accord with applicable decisions of this court.”

In fact, the order of Ohio Supreme Court reversing Mr. Tate’s conviction simply presents questions arising under

the Ohio Constitution, the Ohio Revised Code and Ohio's criminal rules.

As stated in detail in the Ohio Supreme Court's Opinion, Mr. Tate's trial counsel agreed to waive the right to trial by jury in an off-the-record pretrial conference that was not attended by the Defendant. Mr. Tate did not waive his right personally, either in writing, or by a statement made in open court. In Ohio, the right to trial by jury is guaranteed by the Ohio Constitution in all cases where a conviction might result in imprisonment. Article I, Section 10, Ohio Constitution. That right is further guaranteed by Ohio Revised Code Section 2945.17. (Petition, 2a-3a). The Ohio Revised Code, at Section 2945.05 provides a specific means of waiving a trial by jury:

"In all criminal cases pending in courts of record in this State, the defendant may waive a trial by jury and be tried by the court without a jury. Such waiver by defendant *shall be in writing*, signed by the defendant, and filed in said cause and made a part of the record thereof." (emphasis added).

On appeal Mr. Tate argued that his Ohio constitutional and statutory rights were violated when he was brought to trial without a jury, despite the absence of a written waiver. While certain constitutional arguments were made before the Ohio Supreme Court, the court relied exclusively on Ohio Revised Code Section 2945.17, and its specific requirement of a written waiver.

That fact is clearly shown in the Opinion of the majority, authored by Justice Sweeney:

"Since R.C. 2945.05 was not complied with in this instance, appellant was denied his Constitutional right to trial by jury." (Petition, 5a)

In a concurring opinion, Justice Holmes suggested that a different result would occur only through amendment of that statute by the Ohio General Assembly:

“An even more appropriate permanent approach would be for the General Assembly to amend R.C. 2945.05 so that a waiver need only be in writing by one charged with a serious offense.” (Petition 7a)

The issues presented by this case arise exclusively from the Ohio Constitution and the Ohio Revised Code, the interpretation of which is best left to the Ohio Supreme Court. The authority primarily relied upon by the State, *North Carolina v. Butler*, 60 L. Ed. 2d 286 (1979) involves the right to counsel, rather than the right to trial by jury, and does not involve a state statute specifically requiring a written waiver of a constitutional right. Since no “federal question” is presented the Petition for Writ of Certiorari is not well taken and should be denied by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Response to Petition for Writ of Certiorari has been served by depositing three copies thereof in the United States mail, first class, postage prepaid, in an envelope addressed to Ms. Dolores J. Hildebrandt, Room 200-A, Alms & Doepke Building, 222 E. Central Parkway, Cincinnati, Ohio 45202.

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Donald J. Mooney, Jr.

